SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2017 0033

DANIEL SHIEL — Appellant

v

THE QUEEN — Respondent

---

| | |
|---|---|
| JUDGES: | SANTAMARIA and COGHLAN JJA |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 3 November 2017 |
| DATE OF JUDGMENT: | 5 December 2017 |
| MEDIUM NEUTRAL CITATION: | [2017] VSCA 359 |
| JUDGMENT APPEALED FROM: | [2016] VCC 1218 (Judge Maidment) |

---

CRIMINAL LAW – Appeal – Sentence – Obtaining financial advantage by deception – Attempting to obtain financial advantage by deception – Sentence of 6 years and 3 months' imprisonment with non-parole period of 4 years – Appellant sentenced on basis that offences are continuing criminal enterprise offences – Whether sentencing judge erred in imposing automatic increase in sentences on charges the subject of continuing criminal enterprise offences – *R v Arundell* [2003] VSCA 69; *R v Grossi* (2008) 23 VR 500; and *Abela v The Queen* [2014] VSCA 266 considered – *Ludeman v The Queen* (2010) 31 VR 606 discussed – Appeal allowed – Appellant resentenced to 5 years and 10 months' imprisonment with non-parole period of 3 years and 9 months.

---

| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Appellant | Mr R J de Vietri<br>With Ms A Renieris | Victoria Legal Aid |
| For the Respondent | Mr G J C Silbert QC<br>with Mr M D Phillips | Mr J Cain, Solicitor for Public Prosecutions |

SANTAMARIA JA
COGHLAN JA:

1 The appellant, now aged 37, pleaded guilty to five charges of obtaining financial advantage by deception and one charge of attempting to obtain financial advantage by deception. On 19 August 2016, he was sentenced in the County Court as follows:

| Charge | Offence | Maximum | Sentence | Cumulation |
|---|---|---|---|---|
| 1 | Obtaining financial advantage by deception ($496,553.18 – 40 transactions) [*Crimes Act 1958* s 82] | 10 years | 3 years | 6 months |
| 2 | Obtaining financial advantage by deception ($280,086.71 – three transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years)[1] | 3 years and 6 months | Base |
| 3 | Obtaining financial advantage by deception ($337,404.95 – four transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 3 years and 6 months | 9 months |
| 4 | Obtaining financial advantage by deception ($100,000 – two transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 3 years | 9 months |
| 5 | Obtaining financial advantage by deception ($233,985.34 – two transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 3 years and 6 months | 9 months |
| 6 | Attempt to obtain financial advantage by deception ($146,606.70) [*Crimes Act 1958* ss 82 and 321M] | 5 years (liable to 10 years) | 1 year and 8 months | Nil |
| **Total effective sentence:** | | 6 years and 3 months' imprisonment | | |
| **Non-parole period:** | | 4 years' imprisonment | | |

[1] The appellant was sentenced on the basis that the offences the subject of charges 2 to 6 are continuing criminal enterprise offences (under s 6H of the *Sentencing Act*) as they involved deceptions of at least $50,000. Thus, the appellant was sentenced on those offences having regard to double the maximum penalty for each offence.

| | |
|---|---|
| **Pre-sentence detention declaration** | 7 days |
| **Section 6AAA Statement** | 8 years and 4 months' imprisonment with a non-parole period of 5 years and 6 months' imprisonment |
| **2 Other relevant orders** | Forensic sample order pursuant to *Crimes Act 1958* s 464ZF(2) |

4 On 17 May 2017, Priest JA granted the appellant leave to appeal against sentence on one ground, which is set out below.

***Circumstances of the offending***

5 Between September 2011 and January 2015, the appellant was employed by AMP Ltd ('AMP') as a retail claims assessor. His primary responsibility was to assess claims from customers under policies issued for life insurance, total and permanent disability, trauma cover and income protection.

6 The appellant was authorised to assess claims of less than $100,000. He had delegation to authorise payment of those claims. Any claims above that amount were to be assessed by the claims manager.

7 On 23 January 2015, one of AMP's claims administrators raised concerns regarding a $146,606.70 claim payment that the appellant had requested to be processed from an account which the appellant did not normally handle. An investigation later revealed that the appellant had requested the payment to be made to an ANZ bank account which was different to the beneficiary account recorded on the system. This payment was not processed due to concerns about its legitimacy.

8 In order to process the payment, the appellant had been asked to provide written authorisation from the claims manager. The appellant provided an authorisation document purportedly signed by the claims manager. He also provided an email from the customer's authorised representative requesting a one-off payment to be made to the appellant's ANZ bank account. Both of these documents were later found to be false.

9 AMP subsequently conducted an internal fraud investigation in which it searched all payments made by it to the appellant's ANZ bank account. The investigation revealed that, between 23 December 2013 and 16 January 2015, a total of 51 payments had been made to the appellant's ANZ bank account. These payments were based on false claims that the appellant had generated from three different policyholder accounts, resulting in a total loss to AMP of $1,448,030.18.[2]

***Time period and amount the subject of each charge***

10 For reasons that will become apparent, it is necessary to set out the time period and amount in respect of the offending the subject of each charge. The offending the subject of charge 1 relates to a series of 40 transactions over a period of some 10 months between 23 December 2013 and 28 October 2014. The amount the subject of charge 1 is $496,553.18. The time periods in respect of charges 1 and 2 overlap. Charge 2 involved three transactions between 30 May 2014 and 25 July 2014 totalling $280,086.71. Charge 3 involved four transactions between August 2014 and September 2014 totalling $337,404.95. Charge 5 involved two transactions in January 2015 totalling $233,985.34. Charge 4 involved two transactions between November 2014 and December 2014 totalling $100,000.

***Ground of appeal***

11 The appellant was granted leave to appeal on the following ground:

> The learned sentencing judge erred in imposing an automatic increase in the sentences on charges 2, 3, 4, 5 and 6 – continuing criminal enterprise offences.

12 Despite the narrow scope of the ground of appeal, it is nonetheless convenient to revisit the sentencing judge's remarks in order to understand the bases upon which the appellant was sentenced.

[2] Charges 1 to 5 contain rolled up charges which reflect the 51 payments made to the appellant's ANZ bank account. The amount of $146,606.70 relates to charge 6 (attempting to obtain financial advantage by deception).

*Sentencing remarks*

13 In the first place, it is appropriate to extract in full those remarks which concern the increase in the sentences for the offending the subject of charges 2 to 6, each of which the sentencing judge classified as a continuing criminal enterprise ('CCE') offence. Having referred to the 51 payments that had been made by AMP (on the appellant's directive) to the appellant's bank account, the judge said:

> The Charges 1 to 5 inclusive on the indictment contain rolled up charges reflecting the transactions to which I have just referred. The offending conduct involves four offences – that is Charges 2, 3, 4 and 5 – which are continuing criminal enterprise offences under s 6H of the *Sentencing Act*.
>
> In that, they include deceptions of $50,000 or more. You fall to be sentenced on those offences having regard to double the statutory maximum penalty for the offence of obtaining a financial advantage by deception. The statutory maximum being ten years' imprisonment.
>
> Therefore, I am required to sentence you on the basis that the maximum term of imprisonment in respect of those offence is 20 years' imprisonment.
>
> The maximum sentence for the offence subject of Charge 1 is ten years' imprisonment and for Charge 6 of attempting to obtain a financial advantage by deception, five years' imprisonment.
>
> I am sorry. I should amend that. The offence subject of Charge 6 is also a continuing criminal enterprise offence and therefore, it attracts a maximum term of imprisonment of ten years.[3]

14 The sentencing judge turned to the personal circumstances of the appellant. He referred to three reports of Mr Ian Joblin, a psychologist, dated 13 May 2016, 27 June 2007 and 10 January 2004, which counsel for the appellant tendered on the plea.[4] Those reports outlined the appellant's family history, employment history, relationship history and the relationship between his gambling history and his criminal offending.[5] The judge noted that, among the criminal offences of which the appellant had previously been convicted and sentenced, there were offences involving armed robbery and various instances of obtaining property by deception.[6]

3 *DPP v Shiel* [2016] VCC 1218 [7]–[11].

4 Ibid [12].

5 Ibid [13].

6 Ibid [14].

The judge said: 'Clearly, the offences of dishonesty are of relevance.'[7]

15 The sentencing judge emphasised the following aspects of the reports prepared by Mr Joblin:

> [Mr Joblin] points out that you are a person of above average intelligence; that you have shown a capacity for work; that you have suffered from a background of which he characterises as unstable and that you had a long-term relationship with a young lady from about the year 2000, as I understand it, through to 2013.
>
> That relationship with Renee ended in 2013, prior to the offending conduct subject to the indictment. Following that, a period of relative stability came to an end. You resorted to your previous interest in gambling and incurred losses which in turn resulted in you resorting to the dishonesty that is reflected in the indictment.[8]

16 The sentencing judge observed there to be no link between the appellant's alcohol or drug use and his offending. However, the judge considered there to be a link between the appellant's gambling and his offending. He said that it was necessary to consider the extent to which that link impacted upon his sentencing discretion.[9] As is plain from the following passages, the judge considered in detail the relevance of the appellant's gambling addiction to the sentence that should be imposed:

> Your counsel, indeed, the prosecution have referred me to authorities which bear upon the relevance of gambling addiction to sentencing in cases like this. One of those as *R v Grossi* (2008) 23 VR 500 and in that case, at paragraph 56, Redlich JA analyses the factors which bear upon the assessment of relevance of gambling addiction to the sentencing discretion.
>
> I accept entirely Mr Joblin's opinion that during the period covered by the indictment, you had become a pathological gambler. The Court of Appeal judgment in *Grossi*, accepted that that condition can enliven the principles in the well-known case of *Verdins*.
>
> The question remains as to the extent which those principles apply to reduce the sentence that might otherwise have been appropriate. His Honour, Redlich JA, said at paragraph 56:
>
> > 'The relevance of the disorder to the sentence to be imposed, is then to be assessed in accordance with the principles restated in Verdins. That assessment will generally lead to the conclusion that the presence of a gambling addiction should not, on that ground alone, result in any appreciable moderation of sentence. There are a number of reasons

7 Ibid [15].

8 Ibid [16]–[17].

9 Ibid [18].

> why that will be so. First, in most cases, the nature and severity of the symptoms of the disorder, considered in conjunction with the type and circumstances of the offending, will not warrant a reduction in moral culpability or any moderation of general deterrence. Second, it will frequently be the case that crimes associated with gambling addiction will have been repeated and extended over a protracted period.'

And I think it is fair to say that that clearly is the case here. The offending occurred over a period of about 13 months and involved 51 or thereabouts transactions.

> 'Third, in cases involving dishonesty, the crimes will commonly be sophisticated, devious, and the result of careful planning.'

I have not sought to assess the agree of sophistication but your methodology here did involve some careful planning. It was devious and there was a measure of sophistication attached to it.

> 'Fourth, the gravity of such offences, if there is a breach of trust or confidence, will commonly attract an increased penalty making such offences more appropriate vehicles for general deterrence.'

Clearly you were in serious breach of trust in committing these offences.

> 'Fifth, when offences of this nature are committed over extended periods, the prominent hypothesis will be that the offender has had a degree of choice which they have continued to exercise as to how they finance their addiction.'

Again, that clearly applies in your case. Perhaps I should note in your case also that the reports of Mr Joblan [sic] in both 2007 and 2004, to which I have referred, note the apparent link or relationship with between your gambling habit and your offending conduct in connection with the matters upon which you are faced in court at the time that those reports were written.

He had opined in those reports that your gambling had not then reached the stage of being a pathological gambling addiction, but he did reach that conclusion in his report in 2016 …

You had been aware of the opinions he expressed and the links that he drew between your gambling and your previous offending; and you ought to have appreciated the risks attendant upon your continued interest in gambling even though it appears that you had been able to exercise a measure of control through the early period of your employment with the AMP society and noting, of course, that this offending conduct seems to have occurred after the breakup of your long-term relationship with Renee.

Nevertheless, you had been very clearly alerted to the problem that you had with gambling and the previous links to serious offending conduct. Redlich JA went on in paragraph 56 to say:

> 'This has often provided a reason for a general reluctance to temper the weight given to general deterrence or to reduce moral culpability because an offender has found it difficult to control their gambling obsession. Finally, and perhaps most importantly, the nexus of the

> addiction to the crime will often be unsubstantiated. The disorder will not generally be directly connected to the commission of the crime, the addiction providing only a motive and explanation for its commission. Hence, by contrast to a mental condition that impairs an offender's judgment at the time of the offence, such addiction will generally be viewed as only indirectly responsible for the offending conduct.'[10]

17 The sentencing judge concluded:

> I take the view that the addiction was not directly connected with the commission of these crimes and that the addiction provided only a motive and explanation for the commission of these offences. Indeed, it was indirectly responsible rather than directly responsible.
>
> Your conduct was premeditated, calculated and systematic. You repeatedly exercise the choice to reoffend over a lengthy period and in my opinion, that does indeed bear upon the weight to be given to your addiction in the sentencing exercise.
>
> That does not say it is irrelevant. If this offending had been to finance a high lifestyle or for wanton greed, then that may be seen to have aggravated the offending conduct.
>
> This case is not one such. It seems to me that your gambling addiction is part of the context of the offending which is relevant to the overall sentencing discretion, although I do not find that it reduces to any significant degree either your moral culpability or the need for general deterrence. Clearly, there is an ongoing need to deter you from further offending and in my opinion also, to denounce your offending conduct.[11]

18 The sentencing judge also considered the appellant's prospects of rehabilitation. He said that, unless the appellant addressed his gambling addiction successfully either during the course of his sentence or afterwards, then the appellant was vulnerable to committing further offences of the present kind.[12] The judge continued:

> It could become a blight on the rest of your life unless you deal with it. To some extent, it has already been a blight on your life. It will be difficult if not impossible for you to maintain good personal relationships with anybody. It will be difficult for you to live other than an isolated existence.
>
> You are still a relatively young man, 36. I cannot rate your prospects of rehabilitation at this stage as being good. But you certainly have the intelligence and the capacity to work, and one hopes that if you take the opportunities that come your way to deal with your compulsive gambling problem then your prospects of rehabilitation will increase immeasurably.[13]

10 Ibid [23]–[32].

11 Ibid [33]–[36].

12 Ibid [37].

13 Ibid [38]–[39].

19 The sentencing judge had regard to the appellant's pleas of guilty at an early stage, noting that the appellant was to be 'given full credit' for the associated utilitarian benefit and for 'saving the state the cost of a trial and the witnesses the inconvenience of attending the trial'.[14] The judge said that the pleas of guilty and the appellant's cooperation with the authorities reflected his remorse.[15]

20 The sentencing judge referred to two letters of reference prepared on behalf of the appellant.[16] He said:

> I have no doubt that you have many admirable characteristics and that without the reverses that you had in your personal life and without the gambling problem that you have that you may well have been able to continue with a productive working life and indeed to have and developed a satisfactory career.
>
> I am at a loss to understand how it was that with your offending history you were able to obtain a position with the AMP society that entrusted you with a disbursement of funds up to $100,000 and placed you in a position where you were able to exploit your position to commit these offences.
>
> However, be that as it may, I do not attribute any blame for that upon you. I do not know the circumstances in which you obtained your job. But it seems to me to be unfortunate that you were ever able to obtain access to the funds that were obtained by you in the way set out in the prosecution opening.[17]

21 Finally, the sentencing judge noted that the appellant had not committed any offences since the present offending conduct.[18] Before passing sentence, he concluded:

> You have had these matters hanging over your head for a year and a half now, and no doubt that will have been an added stress upon you. You lost the relationship with the young lady who worked with the AMP, but she has at least offered you the support of her friendship since these offences came to light.[19]

22 In passing sentence on charge 1, the sentencing judge said that he regarded the offence the subject of charge 1 'as a serious offence of its kind, noting that the

14 Ibid [40].

15 Ibid.

16 Ibid [19].

17 Ibid [20]–[22].

18 Ibid [41].

19 Ibid.

maximum term of imprisonment for that offence is ten years, rather than 20'.[20]

***The appellant's submissions***

23 In his written submissions, the appellant drew attention to the fact that the sentencing judge imposed higher individual sentences on charges 2, 3, and 5 in circumstances where 'the amounts, transactions and time periods were substantially lower' than that under charge 1.[21] The judge imposed the same individual sentences on charges 1 and 4, yet the amount the subject of charge 1 was almost five times greater than that of charge 4. The judge ordered cumulation of six months on charge 1 and treated the sentence on charge 2 as the base sentence and ordered nine months' cumulation on charges 3, 4 and 5.

24 The appellant contended that the sentencing judge erred in increasing the sentences imposed on the CCE offences without exercising his discretion whether to do so. The appellant pointed to the structure of the sentences and the absence of any reasons or justification regarding the higher individual sentences imposed on the CCE offences in circumstances where the amount of money the subject of charge 1 was substantially larger than the amount attached to the money the subject of each of the subsequent charges.

25 The appellant also contended that the only basis for distinguishing between the sentences imposed on charges 2 to 6 and charge 1 was the automatic increase in the sentences imposed on the CCE offences. He argued that the sentencing judge did not have proper regard to the differential that was required between the sentences

[20] Ibid [43].

[21] To recap, the offending the subject of charge 1 relates to a series of 40 transactions over a period of some 10 months between 23 December 2013 and 28 October 2014. The amount the subject of charge 1 is $496,553.18. The sentencing judge imposed an individual sentence of three years' imprisonment on charge 1. The time periods in respect of charges 1 and 2 overlap. Charge 2 involved three transactions between 30 May 2014 and 25 July 2014 totalling $280,086.71. Charge 3 involved four transactions between August and September 2014 totalling $337,404.95. Charge 5 involved two transactions in January 2015 totalling $233,985.34. The sentencing judge imposed an individual sentence of three years and six months' imprisonment on each of charges 2, 3 and 5. Charge 4 involved two transactions between November and December 2014 totalling $100,000. The sentencing judge imposed three years' imprisonment on charge 4.

imposed on the CCE offences, which were subject to an increased maximum penalty, and the sentence imposed on charge 1.

***Continuing criminal enterprise offences***

26 Part 2B of the *Sentencing Act 1991* is entitled 'Continuing criminal enterprise offenders'. Relevantly, pt 2B encompasses ss 6G, 6H and 6I.

27 Section 6G provides that pt 2B 'applies to a court in sentencing a continuing criminal enterprise offender for a continuing criminal enterprise offence'.

28 Section 6H defines a 'continuing criminal enterprise offender' as follows:

> ***continuing criminal enterprise offender*** means an offender who is found guilty of—
>
> (a) a continuing criminal enterprise offence and who in another trial or hearing or more than one other trial or hearing had been found guilty of 2 or more relevant offences;
>
> (b) 2 continuing criminal enterprise offences and who in another trial or hearing had been found guilty of a relevant offence;
>
> (c) 3 or more continuing criminal enterprise offences;

29 'Continuing criminal enterprise offence' is defined in s 6H as an offence referred to in sch 1A. Schedule 1A includes, among other offences, obtaining financial advantage by deception contrary to s 82(1) of the *Crimes Act 1958* (where the value of the financial advantage obtained is $50,000 or more).

30 'Relevant offence' is defined in s 6H(1) as follows:

> ***relevant offence***, in relation to a continuing criminal enterprise offence, means a continuing criminal enterprise offence of which an offender has been found guilty within the period of 10 years before the date on which the later offence was committed.

31 Section 6H(2) provides:

> For the purposes of the definition of relevant offence in subsection (1), if an offence of which an offender has been found guilty was committed between two dates, the offence was committed on the earlier date.

32 Section 6I doubles the maximum term of imprisonment that is applicable to a CCE offence. It provides:

> (1) A continuing criminal enterprise offender is liable, for a continuing criminal enterprise offence, to a maximum term of imprisonment of 2 times the length of the maximum term prescribed for the offence or 25 years, whichever is the lesser.
>
> (2) This section has effect despite anything to the contrary in this or any other Act.

33 The essential question raised in this appeal is whether the sentencing judge erred in imposing an automatic increase in the sentences on charges 2 to 6. It is to be noted that, during the plea hearing, neither the appellant nor the prosecutor made any submissions in relation to the effect, if any, of pt 2B of the *Sentencing Act 1991* on the sentence to be imposed on the appellant.

34 In *R v Arundell*,[22] this Court considered the effect of pt 2B on sentence in a case where an offender had pleaded guilty to 13 counts of obtaining property by deception, among other offences. The sentencing judge in that case sentenced the offender as a CCE offender on five of the counts of obtaining property by deception, each of which was said to attract a maximum penalty of 20 years' imprisonment. He imposed an individual sentence of four years' imprisonment on each of those counts and sentences of three years' imprisonment for all the non-CCE offences. One of the offender's grounds of appeal was that the judge erred in sentencing on one (or alternatively three) of the counts on the basis that the applicable maximum penalty was 20, rather than 10, years' imprisonment.[23] During the plea hearing in that case, there was no discussion of the manner in which the provisions of pt 2B should apply in the circumstances; nor did the sentencing judge address this issue in his remarks.[24]

35 Having held that the sentencing judge did not err in determining that the offender was to be treated as a CCE offender, Vincent JA (with whom Phillips CJ and Cummins AJA agreed) turned to consider whether the exercise of the sentencing

22 [2003] VSCA 69 ('*Arundell*').

23 Ibid [5].

24 Ibid [28].

discretion miscarried by what appeared to have been 'the effecting of an automatic increase in the penalties imposed' on the impugned counts.[25] He said:

> In the absence of any reasons to explain the difference in the penalties imposed, I consider that serious doubt must exist as to whether proper regard was had in the circumstances of the particular matter before the Court in the determination of what, if any, differential was required between the sentences handed down for the offences subject to an increased maximum penalty and those which were not.
>
> Accordingly I am of the view that his Honour may well have fallen into error in this respect and that the sentencing discretion should be regarded as reopened.[26]

36 In the result, the Court resentenced the offender and reduced the individual sentences for the CCE offences. For completeness, we note that the Court rejected the offender's other grounds of appeal, one of which was that the individual sentences, the total effective sentence and the non-parole period were manifestly excessive.

37 In *R v Grossi*,[27] the offender pleaded guilty to 19 counts of theft. Seven of the counts were rolled-up counts representing single thefts of a number of individual amounts, while 12 counts were all qualifying offences which brought into operation s 6H of the *Sentencing Act 1991*. The sentencing judge in that case held that the offender fell to be sentenced as a CCE offender in respect of 10 of the 12 counts that were qualifying offences and imposed an aggregate sentence of five years' imprisonment in relation to the CCE offences and an aggregate sentence of three years' imprisonment in relation to the rolled-up counts. On appeal, the offender, relying upon *Arundell*, contended that it was impermissible to increase the penalty automatically simply on account of the fact that she was guilty of a CCE offence.[28]

38 In addressing this submission, Redlich JA said:

> The maximum penalty prescribed by Parliament for an offence provides authoritative guidance as to its relative seriousness and is prescribed for the

25 Ibid.

26 Ibid [28]–[29]. See also *R v Roussety* (2008) 24 VR 253, 281 [65] (Redlich JA).

27 (2008) 23 VR 500 ('*Grossi*').

28 Ibid 512 [44].

> worst class of the offence in question. The increase will be relevant whenever the increase shows that Parliament regarded the previous penalties as inadequate. Even in cases where the new maximum is only of general assistance, it becomes the 'yardstick' which must be balanced with all other relevant factors. But it does not necessarily follow that offences should attract an increased sentence because the maximum penalty has been increased. Thus, in *Arundell*, Vincent JA, with whom the Chief Justice and Cummins AJA agreed, regarded the absence of any reasons to explain the difference in the penalties imposed as raising a serious doubt as to whether proper regard had been given to what differential, if any, was required between those offences which were subject to an increased maximum penalty and those which were not. But that is not to say that the amount involved in a continuing criminal enterprise count will not in a particular case provide a sufficient justification, without more, for the imposition of an increased penalty …[29]

39 In *Abela v The Queen*,[30] Ashley and Redlich JJA dealt with an argument advanced by an applicant that, when a sentencing judge imposes sentences for offences, some of which are CCE offences and others of which are not, the judge must explain why and to what extent the facts of the CCE offences have led to the imposition of a greater sentence on those charges (assuming that that is what has happened) than on the non-CCE charges.[31] In support of this contention, reliance was placed upon *Arundell* and *Grossi*. After summarising the relevant facts and the reasoning in each of those cases, Ashley and Redlich JJA said:

> Both *Arundell* and *Grossi* were cases in which a judge imposed very different, and in substance uniformly different,[32] sentences for CCE and non-CCE offences which had been committed by the offender in identical circumstances. In each instance the judge said nothing to explain 'what, if any, differential was required' between the sentences imposed for the CCE and non-CCE offences. It was to be inferred that the judge had automatically increased the sentences for the CCE offences only because the maximum penalty was greater.
>
> In our opinion, what was said in *Arundell* and *Grossi*, in those distinctive circumstances, cannot be understood to mean, in a case where —
>
> (i) discrete and different sentences are imposed for many offences;
>
> (ii) the different circumstances of every offence are described;

29 Ibid 512 [45] (citations omitted).

30 [2014] VSCA 266.

31 Ibid [20].

32 In *Arundell*, many uniform sentences (they differed only depending upon whether the offence was of a CCE or a non-CCE kind) were imposed. In *Grossi*, the CCE and non-CCE offences were aggregated, and different aggregate sentences were imposed.

(iii) the impact of particular offending upon the victim is outlined;

(iv) circumstances in mitigation are fully described; and

(v) principles relevant to sentencing the offender, including the maximum penalty applicable to the various offences, are identified;

that it is then necessary for the judge to explain why the sentence for each CCE offence differs from the sentence imposed in respect of each non-CCE offence. The judge's reasons for imposing a particular sentence in the case of a particular offence will be explained by his or her synthesis of the matters to which we have just referred. To conclude that more should be required of a judge would invite, as occurred in submissions in this case, argument of a structural kind which this Court has consistently discouraged.[33]

***Analysis***

40 Section 281 of the *Criminal Procedure Act 2009* ('the Act') relevantly provides:

**Determination of appeal**

(1) On an appeal under section 278, the Court of Appeal must allow the appeal if the appellant satisfies the court that—

(a) there is an error in the sentence first imposed; and

(b) a different sentence should be imposed.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 278.

…

41 Accordingly, if the appellant is to succeed in the appeal, he must satisfy this Court: first, that there is an error in the sentence initially imposed; and secondly, that a different sentence should be imposed.

42 An offence that is a CCE offence attracts a higher maximum penalty than an offence that is not a CCE offence. Specifically, s 6I of the *Sentencing Act 1991* doubles the maximum term of imprisonment that is applicable to a CCE offence.

43 In the exercise of his or her sentencing discretion in a case where one or more of the offences on an indictment are CCE offences, a sentencing judge must take into account the higher maximum penalty that is applicable to CCE offences. However,

[33] *Abela v The Queen* [2014] VSCA 266 [32]–[33] (citations omitted).

the fact that CCE offences attract a higher maximum penalty does not compel a sentencing judge to increase any individual sentence. Further, where an offence is a CCE offence, the individual sentence imposed for that offence should not be automatically increased by virtue of there being a greater maximum penalty for that offence. Where a sentencing judge increases an individual sentence imposed on a CCE offence, he or she must explain the basis for doing so.

44 While we accept the Crown's submissions that the sentences were increased because they were CCE offences, we consider that it is more likely than not that the sentencing judge increased the sentences simply because the offences were CCE offences. The sentencing judge did not provide any reasons to explain the difference between the penalties imposed for charges 2, 3 and 5, which were CCE offences, and charge 1, which was not a CCE offence. We are satisfied that error has been established.

45 The question then becomes whether we are satisfied that a different sentence should be imposed.

46 At the outset, it must be borne in mind that the term 'a different sentence' in s 281 of the Act is not a reference to a different total effective sentence; it refers to each individual sentence imposed and any consequential orders made for cumulation or concurrency, and any non-parole period which is fixed.[34]

47 In *Ludeman v The Queen*,[35] Ashley and Redlich JJA (with whom Warren CJ, Buchanan and Nettle JJA agreed) considered, among other matters, the meaning of the term 'sentence' in s 281 of the Act and, in particular, whether, in the case of multiple offences, that term embraced each individual sentence imposed and any consequential orders made for cumulation or concurrency, and any non-parole period which is fixed. Ashley and Redlich JJA reviewed various provisions of the Act which assisted in the construction of that term. They also noted the submissions

[34] *Ludeman v The Queen* (2010) 31 VR 606. See also *Brennan v The Queen* [2012] VSCA 151 [96].

[35] (2010) 31 VR 606 ('*Ludeman*').

of the Crown in that case to the effect that the word 'sentence' does not mean (or include) 'total effective sentence', but rather any sentence captured by the definition of 'sentence' in s 3 of the Act.[36] The import of that submission was that, irrespective of whether the total effect of multiple sentences, or the non-parole period, was likely to be any different, leave to appeal should be granted or an appeal should be allowed (as the case may be) in respect of a particular sentence which was arguably erroneous. Ashley and Redlich JJA said:

> In our opinion, both the words of the relevant provisions and history point to the general correctness of the Crown's submissions with respect to grant or refusal of leave. We think it is clear that, in the ordinary case, 'sentence' embraces each individual sentence imposed and any consequential orders made for cumulation/concurrency, and any non-parole period which is fixed; but not what is commonly called the 'total effective sentence'. Thus, in an application for leave to appeal against sentence under s 280, in a matter involving multiple offences, leave should ordinarily only be granted in respect of an individual sentence which is arguably erroneous, but should be refused in respect of other individual sentence(s). Leave will extend, in such a case, to any consequential order for cumulation/concurrency made in respect of the impugned sentence and to any non-parole period which has been fixed. It will so extend without separate specification on the grant of leave.[37]

48 Relevantly, Ashley and Redlich JJA gave the following reasons for their interpretation of the term 'sentence' contained in the relevant provisions:

> We first note that the language of s 278 refers to 'a person sentenced for an offence', and to appeal 'against the sentence imposed', so as to create a linkage between an offence and the sentence passed for that offence.
>
> We secondly observe that this concept is carried into s 280. The 'application for leave to appeal under section 278' there mentioned is an application for leave to appeal against sentence imposed for an offence. The reference in subs (2) to 'a less severe sentence than the sentence first imposed' again links offence and sentence. The fact that there may be a challenge to multiple sentences, each passed with respect to a discrete offence, does not gainsay the necessary linkage.
>
> Third, the definition of 'sentence' in s 3 of the Criminal Procedure Act, with its cross-reference to Pts 3, 3A, 4 and 5 of the Sentencing Act — there being no reference to 'total effective sentence' in those Parts, but only the reference to 'the aggregate period of imprisonment' in s 11(4) to which we earlier referred, and the reference (in the context of "aggregate sentence of imprisonment") to 'the total effective period of imprisonment that could have been imposed in respect of the offences' — reinforces the conclusion that 'sentence' where used in ss 278, 280 and 281 is an intended reference to a sentence for an individual

[36] Ibid 614 [54].

[37] Ibid 614–5 [55].

> offence. It also strongly contraindicates 'the sentence' being read to include a 'total effective sentence' in a multi-sentence case.
>
> Fourth, the definition of 'sentence' is apt to include a non-parole period, which is 'part of the sentence' for an offence — see s 11(1) of the Sentencing Act. Thus, if the sentence for an individual offence is arguably erroneous, a grant of leave in respect of that sentence will pick up a non-parole period which has been fixed, even if that period has been fixed by reference to the aggregate period which the offender is liable to serve under all sentences imposed.
>
> Fifth, if an individual sentence to which was attached an order for cumulation is arguably erroneous, then if the appeal succeeds it will necessarily follow that the question of cumulation will fall for consideration afresh on resentencing. Orders under s 16 are themselves 'sentences' within s 3 of the Criminal Procedure Act. But we think that it is unnecessary to grant separate leave to appeal against such an order where it is attached to an individual sentence in respect of which leave to appeal is granted. That is because such an order is inextricably connected with that individual sentence.[38]

49 In the present case, we would set aside the individual sentences imposed on charges 2, 4 and 5 and the orders for cumulation on charges 2, 3, 4 and 5. In resentencing the appellant, we would make charge 3 the base sentence; the amount the subject of charge 3 was higher than any of the amounts the subject of the other charges that were CCE offences. We would reduce the individual sentence imposed on charge 4 to two years' imprisonment and also reduce the individual sentences imposed on each of charges 2 and 5 to three years' imprisonment. The differences in the sentences are intended similarly to reflect the differences in the dollar amount the subject of the various charges.

50 We would make an order for cumulation of nine months on charge 2. We would reduce the cumulation ordered on charge 4 to six months to reflect the fact that the amount the subject of charge 4 is lower than any of the amounts the subject of the other charges. We would also reduce the cumulation ordered on charge 5 to seven months to reflect the fact that the amount the subject of that charge is lower than the amount the subject of charge 3 but higher than the amount the subject of charge 4.

51 Finally, in light of the new total effective sentence of five years and 10 months' imprisonment, we would fix a non-parole period of three years and nine months.

[38] Ibid 615–6 [60]–[64].

*Conclusion*

52 We would allow the appeal and, consistently with the foregoing reasons, resentence the appellant as follows:

| Charge | Offence | Maximum | Sentence | Cumulation |
|---|---|---|---|---|
| 1 | Obtaining financial advantage by deception ($496,553.18 – 40 transactions) [*Crimes Act 1958* s 82] | 10 years | 3 years | 6 months |
| 2 | Obtaining financial advantage by deception ($280,086.71 – three transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 3 years | 9 months |
| 3 | Obtaining financial advantage by deception ($337,404.95 – four transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 3 years and 6 months | Base |
| 4 | Obtaining financial advantage by deception ($100,000 – two transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 2 years | 6 months |
| 5 | Obtaining financial advantage by deception ($233,985.34 – two transactions) [*Crimes Act 1958* s 82] | 10 years (liable to 20 years) | 3 years | 7 months |
| 6 | Attempt to obtain financial advantage by deception ($146,606.70) [*Crimes Act 1958* ss 82 and 321M] | 5 years (liable to 10 years) | 1 year and 8 months | Nil |
| **Total effective sentence:** | | 5 years and 10 months' imprisonment | | |
| **Non-parole period:** | | 3 years and 9 months' imprisonment | | |
| **Section 6AAA Statement** | | 7 years' imprisonment with a non-parole period of 4 years and 6 months' imprisonment | | |

53